APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,554

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH-AMERICAN LINE), ET AL., PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, AMERICAN SOCIETY OF TRAVEL AGENTS, INC. ("ASTA"), INTERVENOR.

On Petition for Review of a Final Order of the Federal Maritime Commission

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Decided June 10, 1965

Before EDGERTON, Senior Circuit Judge, and WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a petition by steamship lines, which are members of the Trans-Atlantic Passenger Steamship Conference (TAPC) and the Atlantic Passenger Steamship Conference (APC), to review a final order of the Federal Maritime Commission in a proceeding begun on petition of the American Society of Travel Agents, Inc. (ASTA). Insofar as relevant here, that order disapproved under Section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. § 814 (Supp. V, 1959–63),

two provisions of the steamship conference agreements, namely: (1) the provision which requires unanimous action of Conference members (the petitioning steamship companies) to fix or alter the maximum commission payable to travel agents appointed by the Conferences to sell passenger bookings on Conference ships (hereinafter referred to as the "unanimity rule"); and (2) the provision which prohibits travel agents so appointed from selling passenger bookings on competing non-conference steamship lines without prior permission from the Conferences (hereinafter referred to as the "tieing rule").

Three United States steamship lines and twenty-three foreign-flag steamship lines comprise the membership of the steamship conferences before us.[1] We note that our country has adopted a policy, in the international transportation field, of encouraging, or at least allowing, United States carriers to participate in the steamship conferences, and to be governed by unanimity in respect of matters covered by conference agreements, barring disapproval under the standards prescribed by 46 U.S.C. § 814. Congress has recognized that, without such agreements, competition could become so destructive as to wreck the carriers. See S.Rep.No. 860, 87th Cong., 1st Sess. 4, 8–9, and *passim,* (1961), issued with respect to an investigation of the shipping industry,[2] and the "Alexander Report," H.Doc. No. 805, 63d Cong., 2d Sess. 46–47, 295 (1914), the study leading to the Shipping Act of 1916.

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[1] TAPC consists of two American-flag carriers and 23 foreign-flag carriers. APC consists of three American-flag carriers and 22 foreign-flag carriers.

[2] The Report says in part at page 4:

"The history of ocean shipping proves beyond peradventure that these competitive rigors are so potentially violent that when unleashed almost invariably they destroy the

And cf. Boyd [the then Chairman of the Civil Aeronautics Board], *The Future of the International Carrier,* FLIGHT FORUM 7 (Sept. 1964).[3] To this end, Congress has provided in 46 U.S.C. § 814 that such steamship conference agreements are exempt from the provisions of the United States antitrust laws when approved by the Federal Maritime Commission, that the Commission may disapprove an agreement only if it finds the agreement to be

> "unjustly discriminatory or unfair as between carriers . . . , or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter,"

and that it *shall* approve all other agreements.[4]

requisite dependability, regularity and nondiscriminatory nature of ocean common carriage.

"For many years all of the maritime nations of the world, including the United States, have realized that the inevitable monopolistic and discriminatory nature of rate-war competition among the ocean common carriers serving their foreign commerce, justified the formation of conferences so that the carriers may limit or regulate competition between or among themselves."

[3] Chairman Boyd there said:

"IATA [International Air Transport Association, an organization somewhat similar to the Conferences presently before us] will continue to be the machinery for developing fares and rates. . . . This will be true whether or not the unanimity voting rule continues to apply as it has in the past. This rule, originally adopted and insisted upon by the United States to protect each carrier's right of individual action, admittedly has its deficiencies. However, I am inclined to conclude these are less than those which would stem from a form of majority vote."

[4] The text of Section 814, as amended, reads, insofar as here pertinent, as follows:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission

1. The Unanimity Rule.

In his Initial Decision the Hearing Examiner, appointed by the Commission, concluded that the unanimity rule should be approved. Upon review the Commission (by vote of three members, with two members dissenting) disagreed, finding that the unanimity rule as applied to agents' commissions operates to the detriment of the commerce of the United States and hence must be disapproved under Section

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a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition . . . . The term 'agreement' in this section includes understandings, conferences and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. . . .

* * *

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto."

15 of the Shipping Act.[5] The Commission based its factual conclusion on the following considerations:

> "It [the unanimity rule] is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage *vis-a-vis* the airlines."

As to the first point, we cannot agree that the unanimity rule prevents complete and effective service by travel agents. The commission rate of 7% which was being paid at the time of the hearing below was arrived at by unanimous agreement and was the same as that paid by the transatlantic airlines. It was found, however, that appointed agents tend to push air rather than sea travel, because, as the Commission stated, it "takes approximately three or four times as much of an agent's time to sell sea as compared with air space, and several years of experience are required to produce a really competent steamship passage salesman."[6] On the basis of the Commission's

[5] There is no merit in the point that the Commission is without power to disapprove an agreement which has been previously approved. The statute quoted above in footnote 4 expressly confers the power to do so, provided the Commission finds that the agreement does one of the four things named in the statute as grounds for disapproval. But where the disapproval follows a history of prior approvals, as here, see the dissent of Commissioner Patterson concurred in by Commissioner Day, we think that the finding should be scrutinized by a reviewing court with greater care.

[6] The greater time required to handle steamship bookings results, as the Commission pointed out, in a lower "effective" commission rate than that of the airlines.

own statement, therefore, it is not the unanimity rule, but economic factors which prevent agents "from rendering complete and effective service both to passengers and to ocean carriers"—if by that the Commission meant the "pushing" of air over sea travel.[7] And the Commission's opinion suggests no other way in which complete and effective service by appointed agents is prevented.[8]

In this connection it is to be noted that the Hearing Examiner pointed out that, because of the economic

[7] Although the Commission did not refer to it, the record shows that sales of transportation on steamship lines have been increasingly adversely affected by the preference of many travelers for air transportation. As the Examiner noted, this preference is due in part to the pushing of air travel by agents in their own interests, and in part to the saving of travel time, particularly on jets, extensive advertising by airlines, and other factors.

The Commission found, moreover, that "differences between [conference] members over agents' commissions are usually eliminated or compromised, the minority giving way eventually to the majority." And the Examiner found, based on testimony which the Commission seems to have credited, that in view of the small minority of American-flag lines in the conference, the unanimity rule in this respect is "of substantial value to the American-flag lines" preventing "travel agents from playing one line against another." The Commission noted, however, that "American lines have often been in the vanguard for commission increase and as near as can be determined have never blocked proposed increases."

[8] The Commission refers to instances where there has been a diversion from sea to air passage by non-appointed agents "against the best interest of the prospective passengers." While the Commission recognized that the non-appointed agents did not owe any duty to the conference lines, it stated that the diversion was not in the interests of the conference lines themselves. That probably is so, but it has little relevance in connection with the unanimity rule in this context.

advantage to the agent in selling air transportation over steamship transportation, the practice by appointed agents of diverting a prospective passenger from sea to air transportation "is prevalent enough to constitute a substantial competitive disadvantage for the shiplines and an interference with a free and objective choice between the two modes of transportation by potential travelers, such interference being based on the self-serving interest of the travel agents." He found that this practice is not in "the best interest of the traveler"; "is not in the best interest of commerce and is adverse to the public interest." But he noted that the conferences might amend their rules to prohibit such diversion, with appropriate penalties for violations (though we do not pass on this conclusion as a matter of law); and that it was not the unanimity rule on commissions which had caused the evil. We find this reasoning persuasive.

As to the second reason or ground given by the Commission for disapproval of the unanimity rule as applied to agents' commissions—that the desires of the majority of the steamship lines are frustrated, thus placing steamship lines at a competitive disadvantage—we find nothing in the Commission's findings to indicate that frustration of the desires of the majority is the factor which places steamship lines at a competitive disadvantage. As the Examiner stated, the record does not show that a majority would decide now to raise the commission level above 7% or would have raised it to that figure at any time before the conference voted unanimously to do so in 1956. Indeed, the Commission itself said that for economic reasons, it perhaps is not feasible for the steamship lines to raise commission levels at the pres-

ent time. Most significantly there is no finding that a higher rate would improve the competitive position of the steamship lines.

As Commissioners Patterson and Day point out, even though effectuation of the wishes of the majority as to the commission level has been delayed or deterred by the unanimity rule, that result does not fall within any of the statutory tests. As they said: "The effect of the obligation [unanimity rule] on the public and on our commerce is the relevant test." Moreover, as both the Commission and the Examiner noted, disapproval at one meeting does not block further consideration of the proposal at the next meeting—as the history of the agents' commissions in this case indicates—and eventually ultimate agreement—as again the history here supports. The fact that the wishes of the majority may be blocked temporarily, or in an extreme case even permanently, by the unanimity rule is not in our view a sufficient reason under the statute for disapproval—failing some persuasive findings demonstrating detriment to the commerce of the United States. We do not find that here.

We must remand the order disapproving the unanimity rule to the Commission for reconsideration, with directions either to make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or, if this cannot be done, to vacate that ultimate finding and approve the contract in this respect. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Bond* v. *Vance*, 117 U.S. App. D.C. 203, 327 F. 2d 901 (1964).

2. The Tieing Rule

Although the Commission disapproved the tieing rule under 46 U.S.C. § 814, we are unable to find any ultimate factual conclusion within those specified in that section which would support its disapproval. That is, there is no finding that the rule is "unjustly discriminatory or unfair as between carriers, . . . ," that it operates to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of "this chapter." In the absence of such a specific finding, the rule is, by direction of Section 814, to be approved.

To be sure, the Commission may have relied on the criteria established by the Hearing Examiner as follows:

> "Any provision . . . [of the agreements or rules thereunder] which prevent travel agencies in the United States from rendering complete and effective service both to passengers and to ocean carriers operate to the detriment of the commerce of the United States. All conference-imposed restraints which prevent the travel agent from properly performing his function of selling ocean transportation, for which no reasonable justification exists, should be eliminated by the Commission's disapproval, cancellation, or modification of the subject agreements. . . ."

But the Commission did not demonstrate or find that the tieing rule prevents travel agencies in the United States from rendering complete and effective service both to passengers and ocean carriers to the detriment of the commerce of the United States, nor did it find that the rule prevents the travel agent from properly performing his function of selling ocean transportation. It found that TAPC members carry 99% of the passengers moving by water across the Atlantic and

that the non-conference cargo vessels must rely on travel agents for the sale of their 1% share of ocean transportation, but it did not find that non-conference vessels must rely on *conference-appointed* travel agents. It stated also that there is no evidence to demonstrate that TAPC would disintegrate without the rule. It pointed out that, although the principal economic threat to the conference lines is from the air carriers, the conference allows its appointed agents to sell air travel. But there is a complete lack of findings bringing the case within the criteria adopted by the Examiner, assuming for present purposes that such criteria are properly used to supplement the statutory provisions themselves.

The Examiner disapproved the tieing rule also, without stating his specific ground for disapproval in the statutory language. He pointed out that the purpose of the rule was an anti-competitive one—to keep non-conference vessels from booking passengers—but that the practice is not applied to sale of air transportation, the chief competition for the conference lines.

The Examiner concluded that the tieing rule had not been shown to be necessary to promote stability in rates or to combat destructive competition, and that the need for the rule no longer exists, if it ever did.

We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here. Many of the matters covered by conference rules are restricted and even monopolistic in tendency. Yet, if the agreement is approved under 46 U.S.C. § 814, an exemption from the antitrust laws is specifically given by that section. The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways

set out in the section by Congress.[9] See the dissent of Commissioner Patterson, joined by Commissioner Day, on this point, emphasizing that the need for the rule from a competitive standpoint has not been made a standard for approval or disapproval by the statute.

Since there is no finding here that the tieing rule operates in any one of the four ways which Congress prescribed in 46 U.S.C. § 814 for disapproval, we must return the case to the Commission. Such a finding is not for us to make. Accordingly, we remand for the purpose of reconsideration, with directions that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U.S.C. § 814.

So ordered.

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[9] This is not to say of course that the Commission must completely separate itself from antitrust principles in determining whether an agreement operates detrimentally to United States commerce or against the public interest, or unfairly as between carriers or in violation of the Shipping Act. *Cf.* Isbrandtsen Co. v. United States, 93 U.S.App.D.C. 293, 299, 211 F.2d 51, 57, *cert. denied sub nom.* Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990 (1954), where we pointed out that the prohibitions of the antitrust laws are not to be invaded "any more than is necessary to serve the purposes" of the Shipping Act.

APPENDIX C

Federal Maritime Commission

No. 873

Investigation of Passenger Steamship Conferences Regarding Travel Agents

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Report on Remand

By the Commission: (John Harllee, *Chairman;* Ashton C. Barrett, George H. Hearn, *Commissioners.*)

This proceeding is before us again upon remand from the United States Court of Appeals for the District of Columbia Circuit. *Aktiebolaget Svenska Amerika Linien (Swedish American Line), et al.* v. *Federal Maritime Commission,* 351 F. 2d 756 (1965).[1] Originally instituted by our predecessor the Federal Maritime Board, the proceeding was the outgrowth of a petition filed with the Board by the American Society of Travel Agents. The Society (or ASTA) requested the institution of an investigation into certain activities of two conferences, the Trans-Atlantic Passenger Steamship Conference (TAPSC) and the Atlantic Passenger Steamship Conference (APSC), established and governed by Agreements 120 and 7840

[1] Unless the context of this report requires otherwise, the Court of Appeals for the District of Columbia Circuit and its decision in *Svenska* will be referred to simply as "the Court of Appeals" and "the opinion."

respectively, both of which were approved by a predecessor agency under section 15 of the Shipping Act, 1916. The inquiry thus begun was the first comprehensive investigation of the relationship between passenger conferences and travel agents since the passage of the Shipping Act in 1916.

After extensive hearings, an initial decision by Examiner E. Robert Seaver and exceptions thereto, we heard oral argument and served our final decision in February, 1964. While we disapproved several other practices of respondent conferences, they sought judicial review of our order only insofar as it disapproved two provisions of their agreements: (1) the provision of the Atlantic Passenger Steamship Conference's agreement requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conferences to sell passenger bookings on conference vessels (the unanimity rule); and (2) the provision of the Trans-Atlantic Passenger Steamship Conference agreement which prohibits travel agents appointed by the respondents from selling passenger bookings on competing nonconference steamship lines without prior permission from respondents (the tieing rule).

In June of last year, the Court of Appeals issued its decision reversing our disapproval of the unanimity and tieing rules and remanding the proceeding to us: (1) "to either make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or if this cannot be done, to vacate that ultimate finding * * * ." and approve the rule, and (2) to either make "an adequately supported ultimate finding * * * which warrants disapproval under the statute or if such finding can not be made on the record" to approve the tieing rule

under section 15. We ordered reopening of the proceeding on the remanded issues. The reopening was limited to the filing of briefs and oral argument by the parties. Respondent conferences, ASTA and Hearing Counsel filed opening briefs, the conferences and Hearing Counsel replied, all parties argued orally.

The Operation and Effect of the Unanimity Rule Provisions of Agreement 7840

The Atlantic Passenger Steampship Conference came into being in 1946 with the approval under section 15 of the Shipping Act of Agreement No. 7840.[2] The APSC's current voting membership is identical with that of the Trans-Atlantic Passenger Conference, except that APSC includes American President Lines and does not include Spanish Line. The conference is headquartered in Folkstone, England, and six of its member lines serving only Canadian ports do not render passenger service at any port on the United States Atlantic Coast.

Article 6(a) of Agreement 7840 sets forth the unanimity rule and provides:

> (a) Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents shall be established by unanimous agreement of the Member Lines.

Conference meetings, including those at which agents' commissions were dealt with, were conducted on an informal basis and votes by the members were neither recorded nor filed with the Commission. Prior to the meetings of the principals, a committee of the conference, called the A. C. Subcommittee, which has initial responsibility on commissions and rates, meets to consider matters which it may present or recom-

[2] For the full text of section 15, see Appendix A.

mend to the principals. Article 3(d) of Agreement 7840 provides:

> * * * Conference action shall be by unanimous agreement of the member lines, except as may be otherwise provided herein.

This has been construed by the conference to require that all recommendations by the A. C. Subcommittee must be based upon the unanimous accord of its members.

In 1950 the maximum rate of commissions payable to travel agents was 6 percent. The minutes of March 8, 1950, show that lack of unanimity prevented the A. C. Subcommittee from recommending an increase in commissions. The minutes of March 9, 1950, demonstrate that again lack of unanimity prevented a recommendation to increase commissions even though "all Lines expressed a willingness in principle to an increase in agency commission" and "the majority of the Lines * * * were prepared to increase the commission to 7½ percent all classes all seasons." A year later, on March 1, 1951, when commissions were finally increased to 7½ percent, the increase excluded, again against the views of the majority, sales made in the so-called high or summer season. On these sales the 6 percent commission remained in effect.

In October of 1951, a majority of the lines again attempted to increase the commission level, but "it was not possible to reach unanimous agreement," and again the failure to increase commissions was in the face of "a strong majority in favour of applying 7½% commission to all classes through the year." Lack of unanimity precluded any recommendation by the Committee to the principals on commission increases and the matter was "deferred for consideration at the Statutory Meeting in March 1952." At the March 1952 meeting the principals deferred the mat-

ter of agents' commissions for consideration in June of that year by the A. C. Subcommittee, but in June the Subcommittee deferred it again for consideration at the conference meeting to be held in October 1952. In October, when the Subcommittee finally took up the matter of commission levels, it was again unable to make a recommendation to the principals because "unanimity could not be reached on a proposal to extend the off-season basis to bookings for seasonal sailings." [3]

The record sheds no light on any further conference action on the level of commissions until a 7 percent year-round commission was set at a special meeting in May 1956. Prior to this the matter had been discussed at a regular February-March meeting in 1956, but apparently no minute was kept on this meeting and none was filed with the Federal Maritime Board. However, the records of United States Lines, a member of the conference, reveal that at this meeting one of the lines exercised its veto power under the unanimity rule to prevent the conference from at once putting into effect "an immediate adjustment in commission to 7% all year."

At the time of the hearing in this proceeding, the airlines paid a 10 percent commission on the air portion of foreign inclusive tours, i.e. selling air tickets in conjunction with a land tour. At this same time APSC members paid only 7 percent on the water portion of such tours. At the APSC meeting in October 1957, Cunard Line complained that "the steamship Lines are seriously handicapped by not giving this [10% tour commission] concession." The travel

[3] The matter of commissions was on the principals' agenda for a meeting in March of 1953, but action was deferred to the Subcommittee meeting to be held in June 1953. The matter was again deferred by the Subcommittee in June. In these two instances the reason for deferral does not appear.

agents themselves pointed out that the difference in tour commission levels was a factor contributing to the "definite tendency to sell air travel." In May 1960 a majority of the principals favored establishment of a 10 percent commission for tours. However, it was not until December 1962, 2½ years later and after close of hearings in this proceeding but before initial decision, that the percentage level for sea portion of tours was increased to equal that of the airlines.

At the present time the percentage level of commissions for booking sea passage is the same as that paid for booking air travel, 7 percent for point to point bookings and 10 percent for tours. But as we pointed out in our previous opinion in this proceeding, the effective level of commission for sea passage is less because the many unique arrangements which must be made when booking sea passage consume three to four times as much of the agent's time as is spent booking air travel. Many potential travelers (the record shows somewhere between 15 and 60 percent) come to travel agencies undecided as whether to go by air or sea. The travel agent is, of course, in a position to influence such a traveler's decision. As the Examiner found there is no question but that there is "an economic advantage * * * to the agent in selling air transportation instead of steamship passage * * *." Thus, while we do not mean to imply that the agent in this situation is unmindful of the traveler's interest, he, the traveler, is nevertheless confronted with an agent whose economic self-interest would make him desire that the client chose air travel rather than sea travel. The record discloses no evidence that a specific traveler has been persuaded to air travel against his desires or to his disadvantage. But this is not surprising and such a showing in our view is not necessary to a disapproval of the unanimity rule. Any such test-

imony by an agent would inevitably place him in an unfavorable position with his steamship employers.[4] As a consequence of this dilemma, the record reveals a "definite tendency" on the part of agents to push air over sea travel in such cases.[5]

Since May of 1956 the agents have actively sought increases in the general level of commissions. They were told by the representatives of the conference members that the difficulty in securing unanimity of

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[4] An example of this unhappy dilemma is found in the following testimony excerpted from the record.

"* * * [Agent] * * *. Q. Would it be fair to say that primarily in recommending whether a patron go by sea or by air you try to find out what he really wants to do most?

"A. That's right.

* * * * *

"Q. And not necessarily your own pecuniary profit?

"A. Well, both things are considered * * *.

* * * * *

"We walk a tightrope, let's say. We have the profit motive."

[5] See the following statement by Ralph Edell, conference appointed travel agent:

"Q. What is your personal policy regarding potential clients who do not manifest a particular desire to go to Europe either by plane or ship? A. There is no policy involved, but if it is easier to sell someone an air line-ticket and if it is a tour where you make more money, there is a definite tendency to sell air travel.

"Q. Is it in fact more difficult and does it take more time to sell a steamship ticket than an air ticket? A. We would estimate generally speaking three times as long overall."

In this regard the Examiner stated, "* * * The record itself does not establish precise data on the extent of this [diversion] because it is not the sort of activity one would volunteer to disclose in detail, but it is clear that this practice is prevalent enough to constitute a substantial competitive disadvantage for the shiplines and an interference with a free and objective choice between the two modes of transportation by potential travelers."

the membership prevented any increase in commissions.

The Operation and Effect of the Tieing Rule Provision in Agreement No. 120

The Trans-Atlantic Passenger Steamship Conference began operation in 1929 with the approval of Agreement No. 120 by a predecessor agency. The tieing rule has been a part of the agreement since 1933 and has never been amended. The conference is headquartered in New York and its membership comprises all of the lines operating regular passenger vessels in the trans-Atlantic trade and some lines operating freighters which can accommodate up to 12 passengers. These lines carry about 99 percent of all of the passengers traveling by sea between the United States and Europe. The remainder of the passenger traffic is handled by nonconference lines operating freighters which can carry a limited number of passengers. Like the conference lines, they must rely upon the travel agents for passenger bookings.

The tieing rule is found in Article E(e) of Agreement No. 120 which provides:

> (e) Sub-agencies Selling Tickets for Non-Member Lines.—A sub-agency shall be prohibited from selling passage tickets for any steamer not connected with the fleets of the member Lines for which it has been duly appointed or from representing in any capacity any steamship company operating such a steamer, if such steamer is operating in any competitive trans-Atlantic trade (unless written permission to do so is first obtained from the member Lines), or acting or representing itself as agency for, or as entitled to do business with any member Line it does not represent by regular appointment. This rule shall not prevent

any sub-agent from booking for any United State Government Line.

The record contains the admission by respondents that the tieing rule is intended to eliminate nonconference competition. Both the conference and the agents treat the rule as an absolute prohibition on the sale of nonconference passenger transportation, and agents have lost some prospective bookings because the rule prevented them from selling nonconference passage desired by the traveling public.

Discussion and Conclusions

The briefs of the parties in this proceeding contain widely differing interpretations of the Courts' opinion remanding this case to us. Respondents on the one hand contend that the remand was for the limited purpose of finding or specifying additional *facts* demonstrating that both the unanimity rule and the tieing rule violate one of the standards of section 15. According to respondents' reading of the decision we are precluded from "rearguing * * * questions already decided by the Court * * *." Thus, any expansion of our previous discussion as to why the already existing facts of record dictate disapproval of both rules under section 15 is, according to respondents, prohibited by the remand. Hearing Counsel and ASTA take precisely the opposite position.

We do not find any such restriction in the Courts' opinion, nor do we read the opinion as precluding us from expanding and clarifying our perhaps too brief discussion of the law, nor even from disagreeing with the Court where the clear intent of Congress and our own experience and best judgment dictate. From our reading of the opinion we are sure the Court would welcome such an approach and because we read the Courts' opinion this way nothing need be

said about the powers of an administrative agency when a proceeding has been remanded to it by a court.

Section 15 of the Shipping Act exempts steamship conferences and other anticompetitive groups from the antitrust laws when and only so long as the agreements establishing such groups are approved by us under that section, *Carnation Company* v. *Pacific Westbound Conference,* No. 20, Supreme Court October Term, February 28, 1966. Section 15 further provides that:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications or cancellations * * *.

In deciding whether continued approval should be allowed the unanimity and tieing rules they must be examined in the light of the four criteria enumerated in section 15. Before applying these criteria to the individual rules in question a word about our general powers and responsibilities under section 15 would seem appropriate.

In determining whether to approve initially or to allow continued approval of an agreement under section 15 we are called upon to reconcile, as best we can, two statutory schemes embodying somewhat incompatible policies of our country—the antitrust laws, designed to foster free and open competition and the Shipping Act which permits concerted anticompetitive activity which in virtually every instance, if not

unlawful under the antitrust laws, is repugnant to the basic philosophy behind them. While it is valid to say that the Congressional policy is that of encouraging or at least allowing the conference system in the steamship industry it is less than valid to contend that this represents a complete and unqualified endorsement of the system. One committee of Congress, after a recently conducted and exhaustive investigation of monopoly problems of the steamship industry concluded:

> The Shipping Act of 1916 has * * * constituted a cornerstone of American maritime policy for almost half a century. It rests upon the assumption that the prosperity of our foreign commerce and the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers. (The Ocean Freight Industry, Report of Antitrust Sub-Committee, House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong. 2d Sess., page 381, often referred to as the Celler Report.)

One needs only a hasty review of the history of the Congressional investigations and agency reorganizations under the Shipping Act, the most recent of which created the present Commission, to conclude that the experience under the Shipping Act has been a good deal less than satisfactory at least from Congress' standpoint.[6]

[6] In this regard "a history of prior approvals" no matter how long, may be an indication of nothing more or less than a failure to scrutinize operations under the particular agree-

The task of reconciling the desire to preserve open competition with section 15's exemption from the antitrust laws which Congress has entrusted to us is, at best, a delicate one and difficult of discharge with precision.

The determination to approve or to allow continued approval of an agreement requires, on the one hand, consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws, and, on the other, a consideration of the circumstances and conditions existing in the particular trade in question which the anticompetitive agreement seeks to remedy or prevent. Thus, before we legalize conduct under section 15 which might otherwise be unlawful under the antitrust laws, our duty to protect the public interest requires that we "* * * scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 57 (C.A.D.C. 1954); cert. denied *sub nom Japan-Atlantic & Gulf Conf.* v. *U.S.,* 347 U.S. 990.

Section 15's authorization of agreements "pooling or apportioning earnings," for instance, does not dictate approval simply because such an agreement is filed and approval is desired by the parties to the agreement. The parties seeking exemption from the

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ment, which failure may or may not have been justified in the particular case. (See Celler Report, Chap. XI, The Federal Maritime Board—A Study In Desultory Regulation.) In any event the difficulties encountered by the member lines under the unanimity rule far outweighs any prior approval of it. Moreover, a prior approval under section 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval.

antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise, and whatever may have been the policy of our predecessors, it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that interest within the meaning of section 15. *Mediterranean Pools Investigation,* F.M.C. Docket No. 1212 served January 19, 1966. *California Stevedore & Ballast Co.* v. *Stockton Port District,* 7 F.M.C. 75 (1962). This is equally true where the agreement in question has received prior approval and the determination to be made is whether to allow that approval to continue unmodified. Disapproval of an agreement on this basis is not grounded on any necessary finding that it violates the antitrust laws but rather because the anticompetitive activity under the agreement invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act and is therefore contrary to the public interest.[7] The foregoing, in our view, constitutes the basic policy to be applied in determining whether to initially approve or to allow continued approval of any section 15 agreement. With this in mind we proceed to a consideration of the rules in question.

The Unanimity Rule

Respondents begin their argument for approval of the unanimity rule by urging that the proper context for our consideration of the rule was that framed by

[7] For a similar construction of section 412 of the Federal Aviation Act which was modeled after section 15 see *Local Cartage Agreement,* 15 C.A.B. 815 (1952); *North Atlantic Tourist Commission Case* 15 C.A.B. 225 (1952); *Six Carrier Mutual Aid Pact,* 29 C.A.B. 168. (1959)

the Courts' opinion remanding the case, wherein it was noted that,

> * * * our country has adopted a policy in the international transportation field, of encouraging, or at least allowing United States carriers to participate in steamship conferences, and to be governed by unanimity in respect of matters covered by conference agreements, barring disapproval under the standards prescribed by [section 15] * * *.

We have already noted that Congressional allowance of the conference system was and is conditioned on the subjection of conferences, agreements, and operations under such agreements "to strict administrative surveillance," to insure fair play, equality of treatment and protection from discrimination.[8] As to the Congressional policy of encouraging or at least permitting carriers "to be governed by unanimity in respect of matters covered by conference agreements," the Court of Appeals on remand to us footnoted a statement made by the then Chairman of the Civil Aeronautics Board in an article entitled the *Future of the International Carrier,* appearing in Flight Forum 7 (Sept. 1964), wherein he said:

> IATA [International Air Transport Association, an organization somewhat similar to the Conferences presently before us] will continue to be the machinery for developing fares and rates * * *. This will be true whether or not the unanimity voting rule continues to apply as it has in the past. This rule, originally adopted and insisted upon by the United States to pro-

[8] See also in this regard the Alexander Report, H. Doc. No. 805, 63rd Cong., 2d Sess. (1914), Vol. 4, page 418, where the Committee stated its belief "* * * that the disadvantages and abuses connected with steamship conferences * * * are inherent, and can only be eliminated by effective government control * * *."

> tect each carrier's right of individual action, admittedly has its deficiencies. However, I am inclined to conclude these are less than those which would stem from a form of majority vote. (Bracketed material the Court's.)

Unanimity in respect of matters under agreements of international air carriers may well be the policy of the United States, but we do not find such to be the policy which governs water carriers under section 15 agreements. Additionally, it would appear that it was not an unqualified unanimity which received this country's encouragement for air carriers. For in *IATA Conference Resolution,* 6 C.A.B. 639 (1946) the proceeding in which the Civil Aeronautics Board approved the IATA resolution authorizing international air carriers to fix rates in concert and the one apparently discussed in the statement quoted above, the Board, after observing that unanimity was necessary to insure preservation of the American air carrier's right of individual action, said at page 645:

> It is further understood that it is not intended that a rate established by a conference agreement thereafter can be changed only by unanimous action. Such a requirement would enable a single carrier to freeze the rate structure, and would create an intolerable situation.

Moreover, the CAB apparently reserved unto itself the power to disapprove any rate fixed by agreement under the IATA resolution.[9]

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[9] We note with interest that the maximum levels of agents' commissions paid by airlines, which are also apparently fixed by unanimous vote appear to be subject to approval by the C.A.B. which has made it quite clear on any number of occasions that it will not approve a rate or commission resolution which is not limited in duration to "a reasonable period of time." *North Atlantic Tourist Commission Case,* 16 C.A.B. 225 (1952).

Our problems under the Shipping Act would appear quite different from those of the Civil Aeronautics Board under the Federal Aviation Act, 1958. Steamship conferences are not required to submit their individual rates and fares to us for our approval. Indeed, it was not until 1961 that conferences were by statute required to file their rates with us. Whatever may have prompted a policy of encouraging or allowing unanimity in international air transportation, such is not in our view the policy of this country in international transportation by sea. In the Senate Report which accompanied H.R. 6775, the bill which became P.L. 87–346, a recent comprehensive amendment to the Shipping Act, the Senate explained its failure to enact legislation on voting requirements in section 15 agreements in the following way:

> And a third matter which, it seems to us, should be handled by Commission rule or regulation, is one which is not limited to the question of dual rate contracts but rather Commission approval of section 15 agreements. For some time shippers and shipper groups have ben urging Congress to amend section 15 so that no conference agreement could be approved which on rate matters required more than a majority vote of the voting carriers. Because of the widely varying needs and membership of the many conferences serving ports of the United States, and because of the detailed studies which should be made * * * before any such decision were reached we think it would be most unwise to legislatively mandate an answer. (S. Rept. No. 860, 87th Cong., 1st Sess. at page 15.)

Thus, far from encouraging unanimity for steamship conferences Congress has expressed doubt as to its worth in the conference system and has left resolution

of the question to us to be settled by rule or regulation if we determine it necessary to resolve the issue on an industry-wide basis.

The remainder of respondents' argument for approval of the unanimity rule may be summarized as follows: (1) the rule "is merely the procedure" by which the level of commissions is fixed and in the absence of a finding that the particular level is "unreasonably low" or "detrimental to commerce" the "procedure" may not be disapproved; (2) the fact that "the wishes of the majority may be blocked temporarily or in an extreme case even permanently" is not a sufficient reason to disapprove the rule under section 15; (3) our own statements in our previous report in this proceeding lead inevitably to the conclusion that "economic factors entirely beyond the control of respondents" and not the unanimity rule account for the trend away from sea travel, and (4) no other basis exists for disapproval.

ASTA on the other hand contends that the rule has caused detriment to commerce and injury to the public interest; represents an excessive and unwarranted invasion of antitrust principles and, since no justification or need for its continuation has been shown, should be and was properly disapproved. Hearing Counsel in a somewhat similar vein contend that the unanimity rule should be disapproved as contrary to the public interest and detrimental to the commerce of the United States because it has frustrated or delayed all attempts by the majority to raise commission levels, thereby keeping the steamship lines at a competitive disadvantage vis-a-vis the airlines, and because it encourages the travel agents' economic self-interest at the expense of the agents' duty to the public.

While it may be correct in one restricted sense to say that the rule is "merely the procedure" by which a given maximum level of commissions is fixed, it is entirely incorrect to conclude that the particular level fixed must be found unlawful before the "procedure" itself can be ordered modified. In dealing with the unanimity rule itself we are faced with a consideration as to what degree we will permit the respondents to go in rigidifying or circumscribing the flexibility of their operations under an anticompetitive agreement—a far different substantive determination than one as to whether a given rate, fare, charge or commission fixed under a particular procedure is itself valid under the law. The former goes to what conditions in furtherance of the purposes and policies of the Act we will impose upon the continued enjoyment of antitrust immunity under an approved section 15 agreement. The latter goes to whether or not a given rate, etc. fixed under the procedures we authorize under such an agreement runs counter to the statute's prohibition against rates, etc. which are detrimental to our commerce. The one is not dependent upon the other.

All the record need show is that the rule itself has resulted in activity unlawful under section 15. Indeed the record clearly shows that this rule, as implemented contrary to the considered business judgment of nearly all of the conference members, has worked to the detriment of the commerce of the United States.

As heretofore noted, the booking of sea passage takes three to four times longer than air passage for an agent to handle, consequently, the effective rate of commission on sea travel is much lower than on air passage. The recognition by the member lines of the diversion from sea to air caused by the lower rate of

commission on sea bookings has long led the majority of the lines to attempt to solve the diversion problem by trying to increase the levels of commissions paid to their travel agents. As Cunard Line stated in its letter of February 15, 1951, urging an increase in the commission:

> Evidence is mounting to confirm our belief that the higher rate of commission paid by the Air Lines on trans-Atlantic bookings is strongly influencing agents towards increasing their business for Air Services, and we feel that the Steamship Lines can only continue to disregard this fact to their detriment.

The Unanimity rule clearly has had an effect inconsistent with the desires of most of the steamship lines to meet the air challenge. The "lack of unanimity" has on several occasions prevented the conference's subcommittee, which has the initial responsibility for commissions, from even reporting the positions of the member lines to the principals, respondents' assertions to the contrary notwithstanding.

The subcommittee minutes for the meeting of October 1951 show that although "there was a majority in favor" of a commission increase, "it was not possible to reach unanimous agreement," and the matter was "deferred for consideration at the Statutory Meeting in March 1952." Again in June 1952 the subcommittee deferred the matter of commissions "for consideration at the meeting of Principals in October 1952." The subcommittee a third time deferred the matter of agents' commissions in June 1953.

While it may be true as an abstract proposition that any matter could be placed on the agenda by a member line, and that the matter of commissions was held "always in mind" by the principals, the facts remain that there is no instance in the record of action taken by the principals without strong concurrence by the

subcommittee and that the present agents' commission is below the level advocated by a majority of the conferences lines as long ago as March 1950.

If the subcommittee is as unimportant as petitioners claim, one is inclined to question the application of the unanimity rule to its deliberations and the necessity for unanimous accord by its members before any recommendation can be made to the principals. Moreover, it is of no significance that the principals have at times taken positions opposed to those of the subcommittee, for these have been in the nature of a watering down of actions favored by at least a majority of the lines. Nor is it any answer to say that had the lines really wanted to raise the commission they could have eliminated the unanimity rule, because elimination of that rule itself required unanimous vote under the conference agreement.

Respondents' references to conference consideration of commission levels "in virtually every year covered by the Commission's investigation" are not impressive. There appear to be few years in which the matter of commissions was in any real sense "considered," due no doubt to the stultifying effect of the unanimity rule and the necessity for subcommittee approval as a condition precedent to conference action. In fact, the Conference Minutes indicate only six instances in which the principals considered the problem of commission levels since March 1950: Minutes of Meeting March 1951; March 1952; Minutes of Meeting May 1956; Minutes of Meeting March 5, 1953; Minutes of Meeting October 1953; Minutes of Meeting of May 3, 1960. Moreover, the meeting of October, 1953 related to an interpretation of the previously set commission level in reference to prepaid commissions.

The effect of the rule on the deliberations of the principals is thus clearly shown by the many instances in which the rule defeated the subcommittee's referral of, or prevented it from making recommendations to, the principals on the matter of commission.

Respondents' contention that "the record fails to show a single example of the unanimity rule frustrating a desire of a majority of the lines as authoritatively expressed by the principals," is not accurate. The principals' meeting of May 3, 1960, shows such an instance. Moreover, the principals' meeting of February–March, 1956, shows a case in which the principals were unable to act because of the action of *one* line. As has been noted, there is no conference minute on the matter of commissions for this meeting. Determining the effect of the unanimity rule upon actions of the principals, as we pointed out, has been rendered difficult because of the conference's failure to keep complete minutes of its meetings and to file them with us. Votes of the principals were neither taken, recorded, nor filed with the Commission, although the approved agreement of the conference required it to furnish the Commission with full records of its activities.[10] The conference's own failure to keep and provide the requisite records has caused whatever evidently sketchiness exists in this proceeding as to the effect of the unanimity rule, and the responsibility for that failure cannot be shifted to the Commission.

The unanimity rule blocked attempts by a majority of the lines to change the general commission level

[10] Article 9(j) of Ex. 2, provides that "copies of all minutes and true and complete memoranda record of all agreed action which is not recorded by minute shall be furnished promptly to the Governmental agency charged with the administration of section 15 of the U.S. Shipping Act, 1916, * * *"

for at least 6 years and the tour commission level for over 2½ years. The general commission level was still below the 7½% advocated by a majority of the lines thirteen years before 1963, the last year of record in this proceeding. Since the increase to 7% in 1956, the record shows several attempts to increase the commission level. The logical inference to be drawn from all of this may well be that the present level of commission is still, because of the unanimity rule, frozen at a level undesired by a majority of the conference members. The fact, however, that the record does not affirmatively show whether or not a majority of the conference members would decide now to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of the commerce of the United States, to wait until there is evidence that it again operates in that fashion before the rule is outlawed would be to suggest that illegal actions cannot be disapproved once they may have ceased. This reasoning would destroy the purpose of regulation.

The evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in this proceeding is a sufficient reason for declaring the unanimity rule detrimental to the commerce of the United States.

Conference procedures must be reasonably adapted to the goal of conference activity, namely, the voluntary effectuation of the desires of the member lines in achieving the concerted action which they, within the limits of the law, feel is appropriate. An essential factor in achieving this goal is, of course, sufficient flexibility under the conference agreement to alter action which the members may have once found desirable but later appears to thwart their desires. At one time 6% appeared to the members of the conference

to be an appropriate maximum commission level to be paid to their agents. For at least some six years, however, this no longer seemed to be the case, so far as a majority of these lines were concerned. The level was finally raised to 7%. It was still below the level advocated by a majority of the lines 13 years before and may well be, as noted above, below the level which they now desire.

Outlawing of unanimous voting requirements, because they failed voluntarily to effectuate the desires of the conference members, has often occurred.[11] A predecessor of this very Commission had occasion to examine an agreement which contained a unanimous voting requirement which enabled one party to prevent changes in port differentials desired by the other parties. Such effect of the unanimity rule was there said to defeat the purpose of the conference—the carrying out of the voluntary action of its members, "[W]hen a rate or rule is once adopted and one party consistently and selfishly refuses to cast its consenting vote which would remove or change that rule or rate the conference to all intents and purposes ceases to be voluntary."[12] The agreement, with its unanimity provision, was thus declared unlawful as being "unfair as between carriers" and "detrimental to the commerce of the United States."

Such results, moreover, have not been limited to situations where the desired freezing effect was caused by a veto. In *Status of Carloaders and Unloaders,* 2 U.S.M.C. 761, 774 (1946), a voting rule "providing that no change shall be made affecting

[11] We have already observed that a sister agency has had occasion to review the freezing of the rate structure caused by a unanimity rule and has condemned such freezing as "an intolerable situation." *IATA Conference Resolution, supra,* at 645.

[12] *Port Differential Investigation,* 1 U.S.S.B. 61, 72 (1925).

rates unless agreed to by not less than 75 percent of water carrier members" was declared unlawful as "unfair as between such carriers and other members" and "detrimental to commerce."

In the instant proceeding evidence exists of both veto usage and blocking of the desires of a strong majority of the member lines for many years. Such results are clearly detrimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers which desired the change and those few who blocked it.[13] For these reasons the unanimity rule must be declared unlawful under section 15.

There are, moreover, additional reasons why the unanimity rule must be disapproved. The unanimity rule has resulted in maximum level of commissions which places the booking of steamship travel at a competitive disadvantage with airline travel. The record clearly shows, contrary to respondents' contention, it is not economic factors entirely beyond their control that have caused this competitive disadvantage but the unanimity rule itself.

There are two economic factors appearing in the record: (1) the speed and seating capacity of the new jet aircraft which result in reduced travel time and added convenience, extensive advertising by airlines and certain other factors inherent in air travel and (2) the additional time which must be spent by the travel agent to book sea passage—the record shows that it takes three to four times as long to book sea passage as it does to book air passage. The former is

[13] The fact that the record is unclear as to whether or not the same carriers consistently blocked the desires of the majority is not important. What is important is that there existed a consistent freezing of commissions at a level which was always contrary to the wishes of some majority.

admittedly not the fault of the unanimity rule, but the latter is an "economic factor" which the substantial evidence of record indicates that but for the unanimity rule could have been overcome by respondents themselves. The purely superficial equilibrium between commissions for booking air and sea passage (both now stand 7 percent for point-to-point bookings and 10 percent for tours) would, the record indicates, have been replaced by the majority of conference lines by a higher "percentage level" of commissions for sea passage which, at the very least, would have reduced the disparity in the respective "effective levels" of commissions. And again, the record before us indicates that until this much is done, the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage—a situation clearly contrary to the public's interest in the Shipping Act's declared purpose of "encouraging and developing * * * a merchant marine adequate to meet the requirements of the commerce of the United States * * *" with foreign countries. Thus, our responsibility for protecting that interest requires that we not grant continued approval to anticompetitive conduct which tends to reduce the effectiveness of our merchant marine, otherwise we would fail in our duty of "strict administrative surveillance over conferences" to insure (1) the continued prosperity of that portion of our foreign commerce placed in our charge and (2) the maintenance of a strong and independent merchant marine. Moreover, the traveling public has a right when selecting a mode of transportation to deal with an agent as free as possible from any motivation to influence that choice because of economic self-interest in booking air travel. Since the unanimity rule creates the situation which tends to foster airline bookings at the expense of potential

steamship bookings it is detrimental to the commerce of the United States within the meaning of section 15.

Significantly, respondents do not here on remand urge a single statutory aim or purpose which is fostered or served by the unanimity rule, nor do they point to a single important public benefit which is secured by the rule.[14]

The Court noted in footnote 7 of its opinion, that the Examiner found that in view of the small minority of American-flag lines in the conference, the unanimity rule was "of substantial value to the American-flag lines" preventing "travel agents from playing one line against another." This is apparently so because "when all lines participate in the selection of rates of commission, no line is in a position to say that it is favoring agents more than another." (Initial Decision of Examiner Seaver at page 40.) Taken at face value this statement is, at best, confusing. It would seem obvious that all lines can "participate in the selection of rates of commission" whether unanimity or a simple majority is required to set the rate. It would seem equally obvious that whether or not unanimity is required, any individual line may, if it chooses to do so, tell an agent that it voted in favor of an increase, thus, indicating that it is "fa-

[14] Nothing demonstrates that the unanimity rule is necessary to preserve or encourage the right of America flag carriers to take independent action as was the case of unanimity under IATA see pages 12–13 *supra*. Indeed, lack of unanimity in IATA leaves the individual carrier free to initiate its own rates (IATA Traffic Conference Resolutions, 6 C.A.B. 639, 645), while under the conference agreement here lack of unanimity serves to freeze the level of commissions and does not permit the individual carrier to initiate its own increases in commissions. Moreover, the rule places the power of potential veto in the hands of each member, six of whom do not even serve American ports.

voring the agents more than another" which presumably voted against the increase. We find this reasoning somewhat less than persuasive, and far short of constituting a showing that the rule is required by some serious transportation need or necessary to secure important public benefits.

The impact of the unanimity rule is clear from the record which shows that since the seven percent commission level finally adopted in 1956 no further increases were made, at least as of 1963, the last year of record here, and that the level of commissions in that year was lower than that actively sought by the majority of the lines 13 years earlier.

The unanimity rule has prevented a majority of the members of ASPC from raising the levels of travel agents' commission and has periodically worked to freeze commissions at levels which are effectively lower than commissions paid by air lines to travel agents when booking air passage. This disparity in the effective level of commissions for booking air and sea passage fosters a tendency on the part of the travel agent to push the sale of air travel which in turn deprives the undecided traveler of his right to deal with an agent free of any motivation based on economic self-interest. We find this situation detrimental to the water-borne foreign commerce of the United States in that it fosters the decline in travel by sea and contrary to the public interest in the maintenance of a sound and independent merchant marine.

Moreover, from the substantial evidence of record it is reasonable to conclude that but for the unanimity rule the majority of the member lines of ASPC would have increased agents' commissions, and it is reasonable to conclude from the record before us that an increase would have enhanced the competitive position of the steamship lines. Had there been a show-

ing that the rule was required by some serious transportation needed, or necessary to secure an important public benefit, or in furtherance of some purpose or policy of the Statute, we might have required more before disapproving the rule.[15] But, in view of our responsibilities under section 15, disapproval of the rule is required in order to protect the public interest against an unwarranted invasion of the prohibitions of the antitrust laws, since it has not been shown to be necessary in furtherance of any valid regulatory purpose under the Shipping Act.

Because of its effect noted above, the use of the rule must be outlawed in deliberations by any group having final or recommendatory power over levels of commissions to travel agents. Accordingly, Article 6(a) of Agreement No. 7840 must be modified to remove the unanimity requirement, and Article 3(d) must be modified to show that it does not apply to any deliberations by recommending or enacting bodies on levels of agents' commissions.

The Tieing Rule

Respondents insist that continued approval must be given the tieing rule since section 15 will not allow disapproval merely because it "runs counter to antitrust principles" or has not been shown "necessary" to protect respondents from outside competition—the only bases which may be advanced on the record in this proceeding, argue respondents.

The record in this proceeding shows that approximately 99 percent of all Trans-Atlantic steamship passengers are carried by conference lines. In 1960, not an unusual year, approximately 80 percent of all Trans-Atlantic passenger steamship bookings made

[15] *Mediterranean Pools Investigation, supra.* See also *Six Carrier Mutual Aid Pact, Supra.*

in this country, other than on cruises, were sold by appointed agents. Both the agents and respondents treat the tieing rule as an absolute prohibition against the sale of non-conference passage. The only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. These lines, like the conference lines, are dependent upon travel agents for the sale of ocean transportation. Thus, as a consequence of the tieing rule, the travel agents have been prevented from performing their function of selling ocean transportation, passengers have been denied the services of travel agents precluded from booking passage upon the means by which they preferred to travel, and the nonconference lines have been denied access to channels which control some 60 percent of all Trans-Atlantic passenger business. The fact that there are conference freighters capable of carrying passengers who wish to travel to Europe is unimportant here.

The important questions here are: should prospective passengers be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels; should agents be denied the right to book them by the means of their choice, and should nonconference lines be denied the use of agents upon whom they, like the conference lines, must depend for the sale of ocean transportation. The answer to these questions must be no.

Respondents admit that the purpose of the tieing rule is to eliminate outside competition, and that purpose has obviously been achieved.[16] Whether or not

[16] The Supreme Court has indicated that restraints on third parties are to be viewed with extreme distrust. It has been held that the "Freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves," * * * and that "Congress struck the balance by

the rule resulted in reducing nonconference competition to its present minimal amount, it is plain that it keeps it there. The tieing rule imposes restraints upon three groups not parties to the conference agreement, the agents, the nonconference carriers and the traveling public. The record here demonstrates that these restraints have operated against the best interests of all three of these groups. Once this was shown, it was incumbent upon the conferences to bring forth such facts as would demonstrate that the tieing rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

No convincing arguments were advanced. Respondents, in the light of their almost complete monopolization of the trade, could hardly make the claim that the rule is necessary to protect the conference from outside competition, and has in fact admitted that it is not.

The conference, accordingly, attempts to justify the tieing rule by stating that it is necessary to maintain conference stability. In contrast to this bald assertion, however, the Caribbean cruise trade operates efficiently without either rule or conference. While conditions in the Caribbean cruise trade may indeed be somewhat different, the absence of both conference and rule therein is enough to show that neither is self-evidently necessary for trade stability.

Respondents finally point to the services performed for the agents as cause for continued approval of the rule. Although it is true that the conference does perform services for the agents through

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allowing conference arrangements passing muster under 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 491, 492–3 (1958).

its bonding and other selective activities, these services are paid for by the agents through annual fees. An additional promotional services performed by lines are made on a line-by-line basis and ordinarily require matching contributions by the agents. In light of the facts that many of these services are performed on an individual line basis, rather than as a conference activity, the services are paid for by the agents, and the agents are not the lines' employees but deal at arm's length with them, as well as the air lines, the conference, although entitled to exercise some control over agents' activities, has made no showing that it is entitled to maintain a complete foreclosure over agents' services for nonconference lines.[17]

The tieing rule of the TAPSC operates to the detriment of three relevant portions of the commerce of the United States, inasmuch as it is an unjustified restraint upon the activities of travel agents which prevents them from selling ocean transportation. It is detrimental to the interest of the agents, one part of our commerce, because it denies them the right to book passengers who desire to travel by nonconference vessels by the means they desire and thus live up to their duty as agents. It is detrimental to the interests of the nonconference carriers, another part of our commerce, because it denies them the use of agents upon whom, they, like the conference lines, must depend for the sale of ocean transportation. Lastly, it is detrimental to the interests of the travel-

[17] Of interest in this regard is the recommendation of the Antitrust Subcommittee of the House Judiciary Committee appearing at page 388 of the "Celler Report," "The Federal Maritime Commission should prohibit conferences from regulating the activities of agents. Passenger conferences should not be permitted by the Commission to regulate the business activities of their ticket agents."

ing public, still another part of our commerce, in that it denies prospective passengers the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels. Nothing has been brought forward which, in spite of these detrimental consequences, could justify the rule. Therefore, it must be disapproved under section 15 as operating to the detriment of the commerce of the United States.

Additionally, the tieing rule is unjustly discriminatory as between carriers, within the meaning of section 15.

In *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957), our predecessor, the Federal Maritime Board, declared unlawful, under section 15 of the Shipping Act as "unjustly discriminatory as between carriers" a provision which had the effect of prohibiting payment of "brokerage" by conference lines to any forwarder-broker who served nonconference lines. The nonconference lines depended upon the forwarder-brokers for the majority of their cargoes, and the conference lines carried most of the cargo in the trade. The purpose of the prohibition was admitted to be the reduction or elimination of nonconference competition. The Board concluded that the provision in question "would foreclose a nonconference line from obtaining cargoes through forwarders in this trade, and shippers who desire to ship nonconference in this trade would be deprived of the services of freight forwarders." It therefore found the provision to be *prima facie* unjustly discriminatory as between carriers and shippers and struck it down as it found nothing in the record which would justify it.

Here the admitted intent of the tieing rule is to eliminate nonconference competition. Agents have lost prospective bookings because the tieing rule prevented them from making nonconference bookings desired by

the traveling public. And nonconference lines have been denied even access to channels controlling 80 percent of the business. We think the reasoning in the *Pacific Coast* case is persuasive, and we find the tieing rule to be unjustly discriminatory as between carriers. It requires disapproval under section 15.

Finally, the tieing rule is contrary to the public interest because it invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the regulatory statute and there has been no showing that the rule is required by a serious transportation need or is necessary to secure important public benefits.

On the basis of the foregoing we conclude that the unanimity rule and the tieing rule are detrimental to the commerce of the United States and contrary to the public interest, that the unanimity rule is unfair as between carriers, and that the tieing rule is unjustly discriminatory as between carriers, within the meaning of section 15, and both rules should be disapproved under that section.

An appropriate order will be entered.

VICE CHAIRMAN JOHN S. PATTERSON, dissenting:

INTRODUCTION

The Commission has been directed by the United States Court of Appeals for the District of Columbia Circuit either to make supporting findings which adequately sustain the ultimate findings that the unanimity rule and the tieing rule in an agreement of a conference of common carriers by water operate to the detriment of the commerce of the United States, or, if no such finding can be made on the record, approve the agreement containing these two rules.

The majority's report responds to the Court's order by deciding that the direction to make supporting

findings does not require supporting facts, but permits supporting rationalizations which expand and clarify a "perhaps too brief discussion" and even "disagreeing with the Court where * * * our own experience and best judgment dictate."

Two introductory comments are needed. *First,* I believe that findings have always been understood to refer to the end-product of looking over, locating, or finding and then assembling in summary form particular facts thought to be most relevant from a record of miscellaneous verbal testimony and written information collected by an Examiner in an agency proceeding.[18] In a way our task is very simple once the facts are assembled. All we have to do is marshal the facts into findings and then show how the findings conform to or vary from what the statute requires by means of reasoning that will appeal to everyone, including the Courts, as convincing. I doubt if the Court of Appeals expected anything more complicated than this, and certainly not substitution of a long discussion for a "perhaps too brief" one. *Second,* my reading of Judge Washington's opinion on behalf of the Court of Appeals discloses nothing with which to agree or disagree, contrary to the majority's assumption. We are not required to argue with the Court of Appeals, but only to state our own case as reasonably as possible. The Judge simply gave examples to illustrate why he had concluded the statutory requirements had not been linked with asserted facts and expressed the difficulties he was having in understanding the report, and then gave us the opportunity to remove his doubts by findings based on facts, not arguments.

[18] *Morgan* v. *United States*, 298 U.S. 468, 480 (1936). Possibly informed speculations in rate cases and established rules of law or ethics are acceptable as facts, but there is no need here for this type of finding.

The majority presents, in the name of facts, conjecture and opinion taken from the record (e.g., "the considered business judgment of nearly all the conference members"). Conjecture and opinion do not become fact by being asserted by witnesses or by attorneys and recorded in docketed papers. I might agree that fostering a tendency as shown by the record is possible, and that preventing of changes has occured. I do not agree there are record facts to sustain the ultimate finding there is discrimination between carriers, or the public interest suffers, or there is detriment to commerce just because selfish tendencies are fostered or water carriers have lost sales and the prevented changes are the real causes. If there are any facts in the 2618 pages of transcript and 141 exhibits, of the type I consider needed to connect the rules with the selfishness and the losses and with discrimination or detriments to commerce or contrariety with public interest, such facts have escaped my review. I do not agree that the alleged harm to some elements of commerce, without more evidence, is a detriment to commerce, nor that such harm is automatically against the public interest.

By my dissent in our first review of this proceeding I concluded on the record before me that approval should be given, pursuant to section 15 of the Shipping Act, 1916, as amended (Act), to the carriers' agreements containing the unanimity voting rule in connection with regulating the level of travel agents' commissions and the rule requiring agency contracts to contain an obligation to sell only passenger tickets issued by the conference carriers and prohibiting sale of passenger tickets issued by competing carriers.

The reasons for my renewed dissent are:

1. Instead of making supporting findings of factual evidence from the record, the majority has only de-

veloped supporting rationalizations based on conjecture and opinion. In my opinion, the Court's instructions have not been complied with.

2. The rationalizations do not supply the evidence and reasoning needed to relate record information to nonconformity with standards of disapproval of agreements in the second paragraph of section 15 of the Act.

DISCUSSION

1. Lack of evidentiary findings.

There is just as much lack of evidence now as when we made the decision in the same Docket No. 873, reported in 7 FMC 737 (1964). There is still no proof in the form of evidence summarized in findings that the agreements may be found:

(a) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors;

(b) to operate to the detriment of the commerce of the United States;

(c) to be contrary to the public interest; or

(d) to be in violation of the Act.

It has been conceded the reopened proceeding was limited to the filing of briefs and oral argument by the parties, i.e., no new evidence was gathered by the Examiner. As a result of examining the old papers and listening to new arguments, the majority has developed a new rationale.

2. The rationale of the majority, as I interpret it, is as follows:

a. The unanimity rule has prevented changed commission percentages and "such results are clearly detrimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the ma-

jority of carriers which desired the change and those few who blocked it".

b. The unanimity rule has resulted in a level of commissions "which places the booking of steamship travel at a competitive disadvantage with airline travel" and the record shows the rule, not economic factors, cause the disadvantage.

c. Until commission levels are raised "the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage" contrary to the public's interest of encouraging and developing the merchant marine.

d. The tieing rule is detrimental to commerce and contrary to public interest because it prevents (1) travel agents from performing their function of selling ocean transportation; (2) passengers from obtaining services of agents if the agents are precluded from booking passage by the passengers' preferred means of travel; and (3) nonconference carriers from having access to "channels which control some 80 percent of all Trans-Atlantic passenger business". Harm to the three elements of commerce is equivalent to detriment to foreign commerce and against public interest.

The rationalizations of the majority are justified by what are thought to be the results in relation to the four section 15 tests referred to by the Court of Appeals. The resulting rules may be plausible and reasonable as stated and abstractly considered might be very good policy, but they achieve the status of an order changing respondents' rights only if they are associated with facts showing the results really will occur. If rules prohibiting unanimity or tieing obligations are intended, section 4 of the Administrative Procedure Act must be followed. Reference is made to my dissent in this same Docket for my arguments

indicating the claimed results are by no means certain and may be just the opposite of what is claimed.

Summarized, my arguments were that:

1. The unanimity rule controlling commissions resulted in no proven detriment to commerce because (a) passenger diversion may have other causes and (b) the percentage levels are only a transitory economic factor subject to competitive change by airlines.

2. The tieing rule resulted in no proven detriment to commerce caused by lack of competitive necessity for the rule evidenced by either (a) denial of competing services of nonconference carriers or (b) harmful effects on other carriers or (c) restraint on travel agents in violation of antitrust principles.

3. I agreed that certain rules concerning prior approval of business decisions of travel agents were against public policy.

There was no doubt in my mind that the unanimity and tieing rules had prevented changes and had prevented certain ticket-selling services, but this result only showed the rules had been successful in doing what they were intended to do, not that they were unlawful by virtue of the mere fact of success. I might have been wrong. Judge Washington's speculations and examples may be wrong too. The different viewpoints must be resolved with more facts, not longer discussion. I don't want to rely on my own experience or best judgment unless supported by basic facts. I need the facts and must weigh them before I can rely on my own experience in solving a problem with which I have never before been confronted.

Certainly no one should, nor do I, expect a reviewing court to sustain my reasoning and ultimate conclusions without supporting facts just because as a Presidentially-appointed Commissioner, contributing competence and expertise in the carrying out of my

duties, I say new standards of conduct are proper and that rules embodying those standards shall be applied to invalidate the agreement provisions, based solely on the dictates of my own experience and judgment, supported only by conjecture and opinion from a record.

I hold that record deficiencies may not be replaced by such conjecture-supported findings as the unanimity rule is a detriment to commerce because it is effective in preventing increased commissions. What is needed, but totally lacking, in this particular case is record support sufficient to make findings of fact which show how the conference's rule blocking or preventing change in commission percentages is incompatible with prohibitions against detriments to commerce as a result of specified facts rather than opinions, speculations, or conjecture substantiated by a rationalizing process. The Commission may not rely merely on "the evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in this proceeding" without intervening factual detail as sufficient reason for the flat conclusion that the unanimity rule is "detrimental to the commerce of the United States.". A court has recently condemned this sort of reasoning. *U.S. Atlantic & Gulf/Australia New Zealand Conference* v. *FMC and USA,* USCA DC Nos. 19,637 and 19,704, June 30, 1966.

The deficiencies in using a rationalizing process to meet the requirements of the U.S. Court of Appeals for the District of Columbia on remand are the same as those pointed out to the Securities and Exchange Commission (S.E.C.) on remand by this same Court of Appeals in *Chenery Corp.* v. *Securities and Exchange Commission,* 80 U.S. App. D.C. 365, 154 F. 2d 6 (1946); reversed, *Securities Comm'n* v. *Chenery*

Corp., 332 U.S. 194 (1947). The issues were also before the Court of Appeals for the second time. An order holding certain financial transactions unlawful and approving a plan of reorganization of a holding company had been issued by the Commission. On petition for review the Court of Appeals held the order invalid, 75 U.S. App. D.C. 374, 128 F. 2d 303 (1942). On appeal the Supreme Court subsequently held as the Court of Appeals had held "that the Commission's order on this record could not be sustained" for want of supporting facts showing public harm and directed the Court "to remand the case to the Commission for further proceedings not inconsistent with its opinion" (id, p. 8), *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943). This action is what happened here except for the Supreme Court appeal. On rehearing before the Commission no new or additional evidence was adduced. The S.E.C. reexamined the problem, recast its rationale, reached the same result, and likewise reaffirmed its former order. The case again was appealed and the same Court of Appeals stated, referring to its prior review, and with exact relevance here, "we had then as we have now a case in which there is not one jot or tittle of evidence tending to contradict petitioner's declared purpose * * *". If the majority's report is subjected to another review, the Court will have the same problem described by Justic Groner as follows in reversing the order a second time:

> Certainly, a reasoned conclusion must be based on evidence, and may not be pitched alone on unresolved doubts, nor upon weaknesses or selfishness which the Commission believes is inherent in human nature. The construction advanced by the Commission would permit it to exercise a power of disapproval free of judicial review, and the notice and hear-

ing required by the statute would become an empty form. The Commission, free of the inhibitions imposed by the particular facts, would be left to roam the widest possible area of authority influenced and impelled only by its own doubts.

Thus considered, it is apparent that the Commission has made its present order without reliance upon such evidence or findings as would warrant our affirmance.

* * * * *

In laying down, as it does, a rule of fiat unassociated with the facts in this case, the Commission has strayed from the course laid out and charted by the opinion of the Supreme Court; and accordingly we must refuse to give it effect. 154 F. 2d 6 (1946) at p. 11.

The *Chenery* case was decided before the enactment of the Administrative Procedure Act on June 11, 1946, and we now have the latter Act defining even more precisely our decision-making responsibilities and separating our adjudication and rulemaking procedures.

The rationalizing problems and the rulemaking effect were the same as here:

(1) no new evidence,

(2) unresolved doubts,

(3) human weakness and selfishness is relied on in the new rationale,

(4) there is no showing how the conduct would be detrimental to public interest, and

(5) there is a laying down of rules of fiat unassociated with the facts in this case.

The Supreme Court reversed the Court of Appeals, but did not invalidate these five elements of deficiency. The Supreme Court decided there were facts showing violation of fiduciary obligations through purchase of company securities by management during

reorganization sufficient to sustain the order. The character of the conflicting interests, created by the program of stock purchases while plans for reorganization of a large multistate utility system were under consideration, was thought to influence adversely accomplishment of the objectives of the Public Utility Holding Company Act of 1935, where control by management whose influence "permeated down to the lowest tier of operating companies" was present. Conflict of interest as an ethical principle was used as a basis of decision. Ethical principles are frequently based on philosophy and become accepted through changes in public attitudes. Consequently, the principles are not susceptible of proof by evidence usually gathered in agency adjudications. The S.E.C. used such principles as findings to support its conclusions, so the Supreme Court was probably justified in not going behind the S.E.C. reasoning and insisting on evidence in this particular instance. The Supreme Court found the deficiencies of the first S.E.C. decision had been overcome. What we have to overcome by adverse facts is a long history of operations under the conferences' unanimity and tieing rules without complaint of harm to carriers or disadvantage to the public. We may not rely on ethical considerations. We have to show with new facts how times have changed.

The standards of the Court of Appeals are still valid, and the majority's report does not accomplish what the S.E.C. report accomplished when it substantiated its order using the presence of conflict of interest.

The deficiency tests apply as follows:

(1) The lack of new evidence is admitted.

(2) When we say ocean carriers are at a competitive disadvantage because of commission levels or the

public has a right to deal with agents free of motivation to influence choices of air or water carriers, we have only begun the analyzing process. The propositions only point the way to further inquiry to remove doubts. Unresolved are the questions of what carriers have been harmed by airline competition caused by passenger agent activity and how badly, and whether commission levels are the real cause of harm. Reference was made to Congressional "doubt" about how to proceed. The majority refers to a lack of evidence "that a specific traveler has been persuaded to air travel against his desires or to his disadvantage." What influence does changing passenger preference have on the disadvantage rather than competition? Have any travel agents disclosed a motivation to disfavor water carriers? What are the consequences of any deviation from the agents' duties to their water carrier principals by such motives? The real objection was said to be the "disparity in the effective level of commissions". This objection means the issue is neither the rule nor how the level got where it is.

The rule may just as easily increase the disparity, and if the rule diminishes the disparity what proof is there the airlines won't retaliate with higher commissions? What effect do all these potential shifts have? The question is asked whether "prospective passengers should be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels" and is answered "no" as though the answer is so obvious as to prove all that is necessary. The question should be whether the denial of the right to utilize the valuable services of agents to fulfill desires to travel on nonconference vessels is a detriment to commerce or contrary to public interest. We need facts to find out and to resolve doubts, and not just a "yes" or "no" answer.

Offsetting the claimed denial of rights of agents to serve and the traveling public to receive is a claim by the carriers to full loyalty of agents to the carriers as principals without conflicting interests to serve competitors. Where is the balance to be struck? Until we have more facts to show a direct relation between voting and between exclusive agency and detriments to commerce, we ought not to use speculation and personal or fictitious experience or "yes" or "no" answers to alter respondents' rights to managerial control over their business assured by the unanimity and exclusive-agency rules. Speculations and personal or fictitious experience do not resolve doubts by being asserted in the name of our own experience and best judgment.

(3) Human weakness and selfishness appear in the form of an attribution of "the economic self-interest of travel agents" to "foster the definite tendency to sell air passage over sea passage." There is no proof, but only the assumption based on personal experience about human greed and a desire to protect people from avaricious influences.

(4) An explanation of how conduct is related to detriments to commerce is not supplied by the speculative results said to have constituted detriments. In place of explanation, we have a statement that it is "clearly contrary to the public's interest" in the purpose of the Act to develop the merchant marine to let anything "foster the definite tendency to sell air passage", but we are not told how this result is achieved. It has to be assumed that anything that helps airlines hurts the merchant marine, but for all I know it may be a part of the public's interest not to hurt airlines by helping the merchant marine. Neither one interest or the other is to be protected or harmed as far as the public is concerned. The same

tendency to "foster" is also said to be "detrimental to the commerce", but it is equally vague as to why detriment to commerce is linked with either the airlines or the merchant marine. Other reasons for a lack of connection to public interest and detriments are discussed in items (2) and (3) above.

(5) At least four rules have been laid down unassociated with facts as a result of the majority's reasoning. Item 2c, for example, refers to the public's right to deal with an agent free from motivation to influence choices. It is to be concluded from the majority's rhetoric that the public's right to freedom from motivations influencing choices will be examined into and the "right" is a matter of general applicability and future effect. For the present proceeding, however, there are no facts proving the assumed motivation, nor its effect on travelers' rights to choose. This statement and items 2a, b, and d, if they won't stand up as findings supported by facts, require proof and public comment if they are to become rules instead.

Conclusion

In conclusion, I find it extraordinarily difficult to reason from this record now after the Court's remand as I did before it was remanded, without more facts. I conclude that the record lacks the facts from which the findings could be formulated in order to determine if the findings support the conclusions advanced by the majority opinion. Lacking the needed facts, I hold the conclusions expressed by the majority to be in error.

The public, reading our respective reports and struggling to understand what we have done with this record in deciding why a conference of carriers should have adopted an agreement requiring a unanimous vote before any change is made in the com-

missions each carrier must allow to be taken out of the price of a passenger ticket, or requiring an agent to represent his principal only and not a competitor, might well wish we would say either a lot more or a little less. A lot more might supply facts from the record showing exactly how such agreements discriminate or harm the public or commerce. A lot less would be a relief if all that is really possible is a statement of position or of ethical principles. But no one is to be spared and the public is to get a restated rationalization of a position in the form of an unneeded justification based on personal experience rather than on a record.

Since the proceeding is before us on remand by a Court and will very likely go back again, the majority might at least have been alert about abstracting some facts which bolster a position, facilitate judicial review, and improve chances of success in litigation. But when all that is done is to offer a statement of why the agreements are bad for the public because of uncontroverted principles about our general powers and responsibilities under section 15, speculations about competition between airlines and water carriers in relation to the decline in ocean travel, unproven motives and assumed rights of passengers to buy tickets of competing principals from an agent of both, the task of meeting the Court's requirements and hence obtaining Court support of our reasons inducing understanding is made difficult indeed. One would expect more facts enabling a decision without the strain of complete reliance on personally perceived intangibles to tell us whether the decision is the right one or the wrong one.

If for no other reason than that section 15 of the Act authorizes the Commission to disapprove agreements only if any of the four conditions exist in fact

and "shall approve all other agreements", the agreements before us should be approved.

I conclude:

1. that findings of fact supporting (a) discrimination and unfairness, (b) detriments to commerce, (c) contrariety with public interest, or (d) violation of law required by section 15 of the Act in relation to agreements of the respondents have not been proven and may not be made on the basis of the record in this proceeding, and

2. that the agreements authorizing unanimous approval of commissions to be paid to travel agents and obligating travel agents not to act as agents for competing carriers must be approved.

COMMISSIONER JAMES V. DAY *dissenting:*

Consonant with the decision of the Court of Appeals this matter has been reviewed for the purpose of making certain findings respecting the illegality of the unanimity and tieing rules or, lacking this, to approve them. I would maintain the latter course.

In my opinion the record does not support disapproval. The evidence is lacking. Conjecture is not enough.

With regard to the unanimity rule, I would note that conference agreements are not unfair as between carriers or otherwise detrimental merely because of unanimous vote procedures maintained by the conference in the absence of sufficient evidence concerning the actual results of operations under such voting rules. See *Maatschappij "Zeetransport" N. V. (Oranje Line)* v. *Anchor Line Ltd.*, 5 FMB 713 (1959). The lawfulness of conference voting rules, whether requiring unanimous, two-thirds, three-fourths, or majority approval must be determined on the basis of evidence introduced at a hearing as to their use in practice, and not on the basis of organizational procedure, etc. See

Pacific Coast European Conference Agreement (Agreements Nos. 5200 and 5200-2), 3 USMC 11 (1948). The record here is lacking in support of the majority position. Indeed, there is evidence of the value of the long-standing unanimity rule to conference carriers (Examiner's decision at pages 40 and 65).

There is also evidence that frustration of the desires of a majority of the conference carriers is not the real factor which places the lines at a competitive disadvantage. Other economic factors are the controlling cause (e.g., the speed of airline service itself). Thus, the majority opinion's claim that the agents' commission level fosters a tendency for agents to sell air over sea travel is hardly compelling. Indeed, the proof is lacking that ocean carrier business has been diverted in any real sense because of agent commission levels. Aside from this, one can hardly rest on the assumption that a rule permitting a majority of conference members to raise the sea commission as high as they might actually decide, would make any real and lasting difference. Any such raising would hardly be expected to correct the cited competitive disadvantage and the possibility is present that air commissions could be raised in return.

With respect to the traveling public, there is likewise inadequate proof that any cognizable rights of prospective travelers were actually violated because of conference agents advocating air travel over sea travel. I am not persuaded that such advocating as may have been done actually resulted in any substantial diversion of people to air against their best interests and judgment. The majority opinion would in this instance attempt to insure the existence of only liner agents who have no proclivities; proclivities which, in this case, would also be adverse to the interests of

their principals. As the Examiner noted (Examiner's decision at p. 70) correction of an advocacy of air by ship agents in this instance is better left to the managerial discretion of the ocean carriers in their dealings with their agents.

As regards the tieing rule, again, conjecture, inferences and assumptions cannot here substitute for record proof.

There is inadequate proof that passengers have been denied the use of travel agents in obtaining passage pursuant to their choice. The record shows that 99 percent of all Trans-Atlantic steamship passengers go conference and that the only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. The record also indicates that there are both conference and non-conference travel agents. The evidence is not persuasive that the percentage of passengers able and wishing to travel non-conference were significantly injured because of any lack of opportunity to deal with agents (where the passengers preferred not booking passage directly with a particular line).

Neither is the evidence persuasive as to any cognizably harmful affect of the tieing rule on non-conference operators. There are non-conference agents. No non-conference carrier intervened in this case to complain against the rule.

Nor is the tieing rule unduly restrictive on the agents in my opinion. The record indicates there are some services performed by the carriers for their agents—a justification for restricting agents' services in return.

Further, the carriers believe the tieing rule is necessary to protect conference stability. I am not persuaded that the conference assertion of need is invalidated merely by the majority's reference to the

Caribbean cruise trade where no conference exists and conditions "may indeed be somewhat different".

The majority assert that the tieing rule is unjustly discriminatory as between carriers within the meaning of section 15; citing *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957). In that case the Maritime Board outlawed a provision (in the absence of justification therefor) which prohibited payment of brokerage by conference lines to any forwarder-broker who served non-conference lines. Of the two non-conference carriers in the trade, one depended upon forwarder-brokers for all cargo and the other for 80% of its cargo. Both non-conference carriers appeared in the case. The Board concluded that all forwarder-brokers in the trade would refuse to serve the non-conference lines and these nonconference carriers would be foreclosed from obtaining their cargo through brokers or forwarders. Here, there appear distinctions (e.g., there remain non-conference agents who can serve non-conference carriers and no non-conference carrier has intervened to assert its dependent need of agents now subject to the tieing rule).

Finally, and in essence, I am not persuaded that the opinion and reasoning of the majority reveals a sufficient record basis for disapproval of the unanimity or the tieing rule as being contrary to the standards of section 15.

[SEAL]

THOMAS LISI,
Secretary.

No. 873

Investigation of Passenger Steamship Conferences Regarding Travel Agents

Order

This proceeding having been remanded by the Court of Appeals for the District of Columbia Circuit and briefs and oral argument having been made by the parties, the Commission on this date issued a report in this proceeding which is hereby referred to and incorporated herein by reference.

Therefore, *It is ordered,* That:

(1) All provisions of Conference Agreement No. 7840 requiring unanimous accord of the member lines in deliberations by any group having final or recommendatory power over levels of commissions to travel agents, including Article 6(a) and Article 3(d), be modified to remove the requirement of unanimity in such deliberations; and

(2) Article E(e) of Conference Agreement No. 120 and the rules adopted thereunder prohibiting the member lines' agents from selling, without prior permission, transportation on competitive nonconference lines be eliminated.

By the Commission.

[SEAL] Thomas Lisi,
Secretary.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20458

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, AMERICAN SOCIETY OF TRAVEL AGENTS, INC., INTERVENOR

On Petition to Review an Order of
The Federal Maritime Commission

Decided January 19, 1967

Before WILBUR K. MILLER, Senior Circuit Judge, DANAHER and TAMM, Circuit Judges

TAMM, *Circuit Judge:* In a previous decision in this case,[1] we remanded to the Federal Maritime Commission because of our determination that the Commission's decision lacked adequate findings to establish and support the Commission's conclusions. We called upon the Commission in that decision to give further consideration to the two controverted issues in the case,

[1] *Aktiebolaget Svenska Amerika Linien, et al.* v. *Federal Maritime Commission, et al.*, 122 U.S. App. D.C. 59, 351 F. 2d 756 (1965).

id est, the legality of the so-called "unanimity rule" and the legality of the "tieing rule."

On remand, the Commission, without taking additional testimony or evidence, accepted additional briefs from the parties, heard oral argument, and reached, by a divided vote, the same conclusions recorded in the earlier proceedings. The Commission's Report and Order on Remand, served July 20, 1966, containing these restated determinations, is again challenged by the same petitioners who had attacked the Commission's earlier action. In its present order, the Commission again strikes down both the provision of the Conference agreements requiring unanimous action of Conference members to fix or alter maximum commissions payable to travel agents (unanimity rule) and the provision of the Conference agreements prohibiting travel agents appointed by the Conference from selling tickets on competing non-Conference steamship lines without prior permission from the Conference (tieing rule). Both of these provisions are described in detail in our earlier opinion in this case, as are the identities of the parties, the provisions of pertinent statutes, and the governing case law.

There is no doubt whatsoever that the petitioner Conference was authorized by Section 15 of the Shipping Act, 46 U.S.C. § 814,[2] to act in concert in all

[2] Section 15 of the Shipping Act, 1916 (hereinafter the "Act"), 39 Stat. 733, as amended, 46 U.S.C. § 814 provides in pertinent part:

"Every common carrier by water, or other person subject to this Chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or re-

shipping matters until and unless the actions were found illegal by the Commission as being detrimental to the commerce of the United States and contrary to the public interest within the meaning of those terms as contained in this statute. The petitioners were, consequently, free to adopt, utilize, and be governed by a unanimous vote requirement on the subject of maximum commissions to travel agents, unless the respondent found the provision was, in fact, detrimental to the commerce of the United States or contrary to the public interest, in accord with the statutory requirements and limitations of 46 U.S.C. § 814. The same principle, of course, applies to the Conference action relating to the "tieing rule." We remanded the Commission's earlier opinion and order to permit the Commission to make findings based on evidence of record, if any there be, to support its conclusions that the Conference actions on those subjects were illegal under the statute.

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ceiving special rates, accommodations, or other special privileges or advantages: controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations * * *."

The case now returns to us upon the same evidentiary record which was before us when we previously reviewed the proceedings. True it is that the Commission's present opinion enlarges upon its previously stated views and is couched at various points in the phraseology of the statute. Careful analysis of the record, however, convinces us that nothing substantial has been added to support, sustain, or even justify the Commission's condemnation and voiding of the Conference actions. As the two dissenting opinions of Commission members accurately point out, the Commission Report lacks sufficient basis in supporting facts or evidence of record and consists only of rationalizations, conjecture and opinion.

We are not satisfied that the Commission has made adequate response to our mandate to eliminate the doubts and problems which we pointed out in our prior opinion. We conclude, consequently, that the Commission's decision is arbitrary and capricious and not supported by substantial evidence on the record considered as a whole.

We see no purpose in further remand, and, accordingly, we reverse the Commission action.

Reversed.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1966

No. 20,458

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), EL AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, AMERICAN SOCIETY OF TRAVEL AGENTS, INC., INTERVENORS

On Petition to Review an Order of the Federal Maritime Commission

Before: WILBUR K. MILLER, Senior Circuit Judge, and DANAHER and TAMM, Circuit Judges

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Maritime Commission on review in this case is hereby reversed.

Per Circuit Judge Tamm.

Dated: January 19, 1967.

Filed January 19, 1967, United States Court of Appeals for the District of Columbia Circuit, Nathan J. Paulson, Clerk.

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